IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 81 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL PRABHUDAS HARGOVANDAS & 1 - Appellant(s)
Versus
JIVIBEN WD/O BABALDAS KACHRABHAI PATEL & 4 - Defendant(s)

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Appearance :

MR TEJAS BAROT FOR MR MC BAROT for Appellant(s) : 1 - 2, 2.2.1,2.2.2
NOTICE SERVED for Defendant(s) : 1,
MR RC JANI for Defendant(s) : 1.2.1, 1.2.2, 1.2.3, 1.2.4,1.2.5

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 15/03/2007

ORAL JUDGMENT

1. Mr.Tejas Barot, learned counsel under the authority of Mr.M.C. Barot, learned counsel for the appellants and

Mr.R.C. Jani, learned counsel for the respondent Nos.1/1 to 1/5.

2. Short facts necessary for disposal of the present matter are that one Shamaldas son of Parshottamdas on 19/2/1946 for a consideration of Rs.300=00 (Rupees Three Hundred only) mortgaged his agricultural land of Survey No.1051 admeasuring 1 Acre and 7 Gunthas in favour of the present appellants for a period of 15 years. Since the appellants (defendants) were minor at the time of execution of the deed, the mortgage was accepted by their mother namely Bai Amba Hargovandas. The said Shamaldas son of Parshottamdas had two sons Shankar Shamaldas and Mangal Shamaldas. During currency of the mortgage, the said Shankar Shamaldas and Mangal Shamaldas on 7/2/1954 executed a gift deed in favour of the respondent – plaintiff and on the strength of this document, the plaintiff submits that he has become owner of the property as equity of redemption has been gifted in his favour. The period to redeem the property expired on 18/2/1961. The period of limitation under the old Act of 1908 was 60 years which was reduced to 30 years and within the said reduced period, the plaintiff filed the suit on 14/7/1978 seeking redemption of

mortgage.

3. The learned Civil Judge (J.D), Visnagar dismissed the suit on 31/7/1984, but on an appeal, the learned appellate court allowed the Regular Civil Appeal No.150 of 1984 and decreed the suit vide its judgment and order dtd.18/4/1992, therefore, the appellants – defendants are before this Court.

4. The appeal has been admitted for hearing the parties on the following substantial questions of law;

(i) Whether in the facts and circumstances of the case, lower Appellate Court has committed an error or law in declaring gift deed as legal and valid and in ignoring admission of Mangaldas Shamaldas that he was a minor at the time of execution of the gift deed dtd.January 7, 1954?

(ii) Whether in the facts and circumstances of the case, the lower appellate court has committed an error of law in directly passing final decree without passing preliminary decree in accordance with the provisions of the Code of Civil Procedure, 1908?

5. Mr.Barot, learned counsel for the appellants submits that if one of the donor was minor on the date of the gift, then, there would be no complete transaction and the

plaintiffs would not acquire absolute rights in the property and would not be entitled to file the suit for redemption.

6. Mr.Jani, learned counsel for the respondents, on the other hand, submits that even if it is assumed, though it is not proved, that Mangaldas was minor on the date of the execution of the gift, then too, the validity of the gift deed to the extent of 1/2 of the property, would not stand nullify. According to him, if Mangaldas was minor on the date of the execution of the gift deed, then too, the gift deed executed by Shankardas would be valid one. According to him, a person who purchases or acquires or receives in gift, equity of redemption even if for part of the property, then, he would be entitled to file a suit for redemption for the benefit of other co-owners and in such a case, mortgagee would not be entitled to submit that the suit is bad for non-joinder of parties.

7. The finding recorded by the appellate court is that the age of Mangaldas was shown to be 22 years in the gift deed, if Mangaldas himself was exhibiting his age as 22 years in the gift deed, then, he himself was required to inform the Court that how he was asserting that he was minor on the date of execution of the gift deed. An admission contained in the registered document would be

an admission and it would bind the person making such admission, unless the admission is explained and the circumstances are brought on the records and the court is satisfied that such admission was based on misconception of law, some mistake of facts or was the result of fraud duress , coercion or undue pressure.

8. In the present case, the finding recorded by the learned first appellate court that Mangaldas was not a minor, being a finding of fact, would bind this Court. Even otherwise, if it is held that the gift deed to the extent of the property of Shankardas would be valid then it would convey the rights in favour of the present plaintiffs to seek redemption.

9. The first question deserves to be decided against the interest of the plaintiffs.

10. True it is that under the provisions of Order XXXIV Rule 7 of the Code of Civil Procedure, in a case for redemption of the mortgage or foreclosure, the trial court would be required to make or pass a preliminary decree with a further direction that rights of the parties be finally settled in final proceedings. In the present case, the defendants had come up with the case that they had spent a sum of Rs.815=00 (Rupees Eight Hundred Fifteen

only) for development and improvement of the property in dispute and they were also entitled to a sum of Rs.300=00 (Rupees Three Hundred only) as mortgage money. The appellate court did not rely upon the defendants' evidence and held that the the defendants failed in proving that they spent had a sum of Rs.815=00.

11. So far as the mortgage money of Rs.300=00 is concerned, the defendants admit the fact that the property was mortgaged with them for a sum of Rs.300=00 and in the suit the plaintiffs are ready and willing to pay the said amount of Rs.300=00.

12. In a case like this, where final rights can be decided at the stage of preliminary decree, then, a formality is not required to be observed. Present is not a case where even in the final decree, the defendants would be entitled to say anything beyond what they have already said. If their submissions are that they are entitled to a sum of Rs.300=00, a final order even at the earliest stage can be passed.

13. Even the second question in the special facts of the case must be decided against the interest of the defendants – appellants.

14. As a sequel to above, the appeal deserves to and is accordingly dismissed. Interim relief, if any, is vacated. No costs. Let a decree be framed accordingly.

(R.S. GARG, J.)

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